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Supreme Court, U.S.
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No. 01-421

In The

Supreme Court of the United States

OCEAN BULK SHIPS, INC. and
TRANSBULK CARRIERS, INC.,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

REPLY BRIEF

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REPLY BRIEF FOR PETITIONERS

The Brief in Opposition filed by the United States asserts three reasons why certiorari is supposedly not warranted in this case: (i) petitioners would lose under either the standard imposed by the Fifth Circuit or the standard imposed by the majority of the courts that have addressed the issue; (ii) petitioners failed to apportion damages; and (iii) a genuine conflict does not exist among the circuits on this issue. *See* Brief in Opp. at 7. Each of these arguments collapses under closer examination.

Far more significant than what the Brief in Opposition says is what it does *not* say. The government does not challenge petitioners' explanation of why this is an important issue, *see* Pet. at 19-21, on which uniformity is particularly essential, *see id.* at 16-19, and on which this Court has never provided guidance, *see id.* at 14-16. In short, the Solicitor General implicitly concedes that – whatever the merits of this particular case – at least the issue raised here is certworthy.

This Reply Brief responds to the government's specific arguments and shows why this particular case is a suitable vehicle to resolve the certworthy question presented.

I. Petitioners would prevail under the majority rule.

The government argues that certiorari should not be granted because the Fifth Circuit concluded that petitioners would not prevail under either the Fifth Circuit standard or the majority rule. However, the decision

below addressed proof issues not reached by the district court. In so doing, the court of appeals supplanted its decision for one that should have been rendered by the district court.

As respondent recognizes, COGSA sets up a burden-shifting scheme whereby the cargo claimant, in this case the government, must initially establish a *prima facie* case of liability. It is only then that the carrier has the burden of rebutting the claim, which it can do by showing its entitlement to one or more exemptions under section 4(2) of COGSA. *See* Brief in Opp. at 2. If the carrier successfully establishes a defense, the burden then shifts back to the claimant to show that the carrier's negligence was a concurrent cause of its loss. *Id.* If the claimant is successful, the burden shifts back to the carrier to show how much of the loss is attributable to its negligence. *Id.*

In this case, the district court concluded that the government failed to carry its burden of proving a *prima facie* case, the initial stage in the burden-shifting scheme. App. B at B-3. The court therefore never reached the second stage in the burden-shifting scheme simply because it did not consider it necessary, even though the evidence clearly established the fact that some damage resulted from insufficient packaging (the exemption under COGSA § 4(2)(n)). If the district court had been concerned about petitioners' rebuttal evidence, it would have raised its concerns and given petitioners an opportunity to address them with additional evidence, if necessary, just as it gave the government an opportunity to produce evidence of its standing to sue on behalf of a

relief agency.[1] If the Fifth Circuit, having decided that the government had carried its burden to prove a *prima facie* case, had remanded the case to the district court to conduct the necessary fact-finding, then petitioners could have carried their rebuttal burden of proof under the proper standard.

The decision below purported to resolve an important issue that should have been decided by the district court. If this Court reverses the Fifth Circuit, it will remain open to the district court on remand to hold that petitioners carried their rebuttal burden.

II. Evidence at trial could have provided a basis for apportioning damages.

The government also argues that certiorari is improper because the Fifth Circuit concluded that petitioners failed to satisfy the fourth and final stage of the burden-shifting scheme by not establishing the portion of the loss attributable to their negligence. For the same reasons noted above with respect to the second stage of the scheme, the district court did not reach this stage of proof because it was not necessary under the circumstances. Once again, the Fifth Circuit substituted its impression of what the evidence "tended to prove" for the district court's perception. For the same reasons as noted above, this Court can and should clarify the applicable burdens of proof and remand the case to the district

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[1] As the trial transcript reflects, the district judge permitted the government to submit post-trial evidence of its right to sue on behalf of Catholic Relief Services. Trial Tr. at 67.

court for further consideration in light of the proper standards.

III. This case creates a clear conflict among circuit decisions on the question presented.

Finally, the government argues that a circuit conflict does not exist on the question presented. As fully explained in the petition, the Fifth Circuit has unmistakably settled its position on the question presented. Pet. at 10, 15. It follows precedent established fifty-five years ago in *Waterman S.S. Corp. v. United States Smelting, Refining & Mining Co.*, 155 F.2d 687 (CA5 1946), and holds the carrier to the higher burden of persuasion in claiming a defense under any of the exemptions set forth in COGSA § 4(2).

The clarified position of the Fifth Circuit is in conflict with all the cases cited by the government. Indeed, the government appears to admit that the Fifth Circuit is in conflict with all of the other circuits: "Petitioners have cited no case from any circuit other than the Fifth Circuit that suggests that a carrier's obligations under Section 1304(2)(n) [COGSA § 4(2)(n)] are analogous to its burden under Section 1304(2)(q) [COGSA § 4(2)(q)]." Brief in Opp. at 8.

As explained in the petition, there is indeed an inter-circuit conflict on an important issue of federal law that this Court should resolve. Pet. at 6-14.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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